LOW PEK NAI

v.

KOH CHYE GUAN @ KOH CHAI GUAN

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS J
[ORIGINATING SUMMONS NO. 24-970-1993]
31 OCTOBER 1994

FAMILY LAW: *Application by natural mother for custody of illegitimate infant children - Whether the Guardianship of Infants Act 1961 applies to illegitimate children - Whether the Court has the jurisdiction to hear the application.*

This was an uncontested application by the plaintiff, the natural mother, for custody of her two illegitimate infant children pursuant to the Guardianship of Infants Act 1961 (the Act).

The issue before the Court was whether it had the jurisdiction to hear the application in view of the decision of the High Court in *Re Balasingam & Parvathy, Infants Kannamah v. Pillay* [1970] 2 MLJ 74 which held, after referring to the English Guardianship of Infants Acts, 1886 and 1925, that the Court did not have the jurisdiction to hear a similar application because the Act did not apply to illegitimate children.

Held:
Unlike the English Acts, our Guardianship of Infants Act does refer to illegitimate children and such reference can be found in the application section. Section 3 contemplates that the State legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is legitimate or illegitimate to the extent that such an application is not contrary to Islamic law. If this provision contemplates such an application as regards Muslim children, then the Act itself must apply to children generally, legitimate or illegitimate. Accordingly, the Court rules that the Act also applies to illegitimate children and has the jurisdiction to hear the application.

[Application granted].

Cases referred to:
Re Balasingam & Paravathy, Infants Kannamah v. Pillay [1970] 2 MLJ 74 ***(dist)***
Re Miskin Rowter [1963] 29 MLJ 341 ***(refd)***
T v. O [1993] 1 MLJ 168 ***(dist)***

Legislation referred to:
Guardianship of Infants Act, 1961, s. 3
Guardianship of Infants Ordinance (Cap. 16)

For the plaintiff - Khoo Soo Eng; M/s Khoo Soo Eng
For the defendant - Absent

JUDGMENT

Mohd Hishamudin bin Mohd Yunus J:

This is an application by a natural mother (the plaintiff) under the Guardianship of Infants Act, 1961 for the custody of her two illegitimate infant children. She had been living together with the putative father (the defendant), and as a result of their relationship, she bore him

two children, a boy and a girl. The defendant later left the plaintiff and the children for another woman whom he subsequently married. Ever since the defendant left her, the plaintiff has been supporting the children without any financial assistance from the former.

The defendant appears not to be interested in contesting this application; for although duly served with the originating summons, he has failed to enter appearance as well as to attend this hearing.

Before *Re Balasingam & Paravathy, Infants Kannamah v. Pillay* [1970] 2 MLJ 74 our Courts had always assumed that they had the jurisdiction under the Guardianship of Infants Act 1961 to entertain an application of this nature and to make such order as the Court deemed fit. For example, in *Re Miskin Rowter* [1963] 29 MLJ 341, which is an application by a natural mother for custody of her illegitimate children under the Guardianship of Infants Ordinance (Cap. 16), the Court, acting on such an assumption, granted custody of the children to the mother.

However, in a subsequent case, this assumption was held to be erroneous by the Court. For, in *Re Balasingam*, it was held by Raja Azlan Shah J (as he then was) that the High Court has no jurisdiction to hear an application by an unwed mother for the custody of her illegitimate children under the Guardianship of Infants Act because the Act does not apply to illegitimate children. In that case, his Lordship after referring to the law of England, in particular, the Guardianship of Infants Act, 1886 and 1925, and the English case of *In Re C.T. (an infant)* [1957] Ch 48 said:

> It is therefore quite settled that the law of England in 1956 was that neither the putative father nor the *de facto* mother of an illegitimate infant can make an application to the Court for an order of custody.
>
> The issue now arises as to whether this law is still applicable here or whether it has been modified by local legislation or case law.
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> The Guardian of Infants Act 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned s. 1(2)(a), would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words "father" and "mother" in ss. 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is safer to say that 'infant' means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

The learned Judge decided not to follow the decision in *Re Miskin Rowter* on the grounds that that case was no authority on the issue whether or not the Guardianship of Infants Act applies to illegitimate children. According to his Lordship, the Court in that case proceeded on the assumption that the Act applies and therefore it had the jurisdiction to hear the application in question.

There is some support for the decision in *Re Balasingam* in the subsequent case of *T v. O* [1993] 1 MLJ 168.

With the greatest respect to the views of the learned Judge in *Re Balasingam*, in the present case, I propose to adopt a different view. Unlike the English Acts, our Guardian of Infants Act does refer to illegitimate children and such reference can be found in the application section. Section 3 states:

> Nothing in this Act shall apply in any state to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that state; and any such law may provide that -
>
> (a) nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an *illegitimate child*, whose mother so professes or professed that religion; and [Italics mine]

The above provision, it will be noted, contemplates that the State legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is *legitimate or illegitimate* to the extent that as such an application is not contrary to Islamic law. Now, if this provision contemplates such an application as regards Muslim children, then, in my view, the Act itself must apply to children generally, legitimate or illegitimate.

I therefore rule that the Act applies also to illegitimate children and that in the present case I have the jurisdiction to hear the application. Accordingly, I grant this application for custody of the two children to the plaintiff.